

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ALVARO ANTONIO,)	
FIDELA ANASTACIO ANTONIO,)	
)	
Plaintiffs,)	
vs.)	NO. 1:07-cv-00006-JDT-TAB
)	
WAL-MART,)	
THERESA THEADEMAN,)	
)	
Defendants.)	

1:07-cv-006-JDT-TAB

¹ This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

Fed. R. Civ. P. 72(b). The district judge may accept, reject, or modify the recommended disposition. *Willis v. Caterpillar Inc.*, 199 F.3d 902, 904 (7th Cir. 1999).

Defendants object to the legal standard applied by the Magistrate Judge on the matter of fraudulent joinder, the factual inferences drawn from the undisputed facts, and the conclusions of law. First, they contend that the Magistrate Judge incorrectly characterizes their burden as requiring proof that “the Antonios would have no hope of prosecuting a claim against Theademan.” This sentence would impose too heavy a burden on the Defendants, if that were the standard applied. But it is merely a paraphrasing of the correct legal standard that was in fact applied. Perhaps Defendants’ concern would have been alleviated had the Magistrate Judge inserted “reasonable” between “no” and “hope.” Regardless, as Defendants acknowledge, “[t]he court correctly notes that the party asserting fraudulent joinder does not have to negate every theoretical possibility of liability; it is enough to show that there is no “reasonable possibility” of individual liability against the non-diverse defendant. This was the standard applied by the Magistrate Judge. And Defendants have not made such a showing.

Defendants next contend that certain facts, e.g., those establishing that the mirror is a fixture, that it was not installed when Theademan was employed, or that she had responsibility for installation of store fixtures, fail to present a “reasonable possibility” that Theademan will be liable. They seemingly overlook, however, the Magistrate Judge’s conclusion that “[i]mproper installation is one possible source of

negligence in this case.” (Rep. & Recommend. 4.) But the Magistrate Judge found that there are other possible sources of negligence.

Defendants further object to the conclusion that there is no law in Indiana addressing a store manager's individual liability for negligence of the store. Conceding that there are no retail premises cases on point, they argue that under Indiana law a corporate officer or agent cannot be held personally liable for torts of the corporation or other corporate agent merely because of the agent's office or holdings. This is a correct statement of law. However, the Magistrate Judge did not conclude that Theademan could be held personally liable merely because of her office, as apparent from his discussion of the delegation of the premise owner's duties toward invitees. (*Id.* at 9-10.)

Accordingly, Defendants' Objections to Report and Recommendation on Plaintiffs' Motion to Remand (Doc. No. 40) are **OVERRULED** and the undersigned **ADOPTS** the Magistrate Judge's Report and Recommendation. The Plaintiffs' Motion to Remand (Doc. No. 17) is **GRANTED**. An order remanding this action to state court will follow.

ALL OF WHICH IS ENTERED this 27th day of September 2007.

John Daniel Tinder, Judge
United States District Court

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